Time Warner v Continental Casualty Co. 02-56221
Reinhardt, Circuit Judge, dissenting:

In my view, the insurance policy cannot reasonably be read to provide coverage for the claims made by Francis Ford Coppola and his co-plaintiffs in *Coppola v. Warner Bros., Inc*., because those claims did not "aris[e] out of" any act "committed in the utterance or dissemination of Matter" under the meaning of paragraph I.A of the policy. There is simply no potential for liability here. Thus, no matter how broad the duty to defend may be under California law, there is no such duty here. I therefore respectfully dissent.

The policy obligates Continental to defend Time Warner against, and indemnify Time Warner for, liability resulting from only two types of claims. Those types of claims relate to two specific aspects of Time Warner's business. Paragraph I.A, on which Time Warner bases its claim, covers the first type: claims arising from unlawful acts that Time Warner may commit in disseminating artistic or informational material to a mass audience. The contract explicitly limits coverage under I.A to claims based on unlawful acts "committed in the utterance or dissemination of Matter by the Insured [i.e., Time Warner] in the Business of the Insured." In section IV, "Definitions," the word "Matter" is defined as "printed audio, visual or informational works uttered or disseminated in any medium of expression *to a mass audience* in the Business of the Insured." ¶ IV.M (emphasis added). The plain language of these provisions is confirmed by the fact

that the unlawful acts listed in I.A are precisely those that one might expect to create liability for a company engaged in disseminating artistic material: the common law privacy torts, torts of defamation, unauthorized use of intellectual property, and the like. ¶ I.A.1–6.

Paragraph I.B covers the second type of claims: claims arising from acts committed in the "gathering, investigation, or acquisition of information . . . for the purpose of including in books, magazines, or News Programming . . . in the Publishing and Cable Businesses of the Insured." The unlawful acts listed in this paragraph—many fewer than in I.A—are those that a large news organization might commit in gathering information: trespass and related torts, as well as "breach of an agreement not to reveal the identity of a news source." ¶ I.B.1–2.

The claims of the *Coppola* plaintiffs are of neither type. Rather, they arose from Time Warner's effort to enforce an alleged agreement between Time Warner and Coppola concerning the development of a movie. The *Coppola* plaintiffs assert that Time Warner's letter to executives of Columbia Studios informing them that Coppola was not free to perform services in connection with Columbia's project was wrongful. Time Warner recognizes that these claims do not fall within paragraph I.B, as they do not involve information to be included in "books, magazines, or News Programming" and do not concern Time Warner's publishing

or cable business. However, contrary to the argument of Time Warner and the holding of the majority, the claims are not covered by I.A either, because the unlawful acts alleged by the *Coppola* plaintiffs were not "committed in the utterance or dissemination of Matter" to a mass audience. The claims at issue in this case are of a type for which Time Warner chose not to purchase insurance, at least not in this policy. The matter should end there. There is no coverage.

Time Warner, however, has persuaded the majority to overlook both the plain meaning of the policy language and the clear intent of the parties to limit coverage under I.A to liability arising out of the dissemination of creative material to a mass audience. The majority's misinterpretation rests upon reading "to a mass audience" out of the contract. This is accomplished by finding a supposed contradiction with this requirement in the definition of "Claim" in paragraph IV.C, a definition that applies to both I.A and to I.B. As the majority notes, "Claim[s]" include demands for money or services arising out of either the "dissemination of Matter" or "the investigation, gathering or acquisition of matter." Essentially, the majority's argument is that, because a claim can arise from acts committed in the acquisition of Matter, and paragraph I.A covers "claims," paragraph I.A covers claims arising from acts committed in the acquisition of Matter.

This argument makes no sense. Paragraph I.A plainly covers only a subset

of claims, not every claim that could fit within the meaning of the word "claim" as defined in the contract's list of definitions. A claim may, indeed, arise from an act committed in the acquisition of Matter, and where such acts arise in Time Warner's publishing and cable businesses, there may be coverage under paragraph I.B. Paragraph I.A, however, is clear that not all claims are covered under that paragraph, only those arising from acts "committed in the dissemination of Matter," which means "to a mass audience." That some claims may arise from acts committed in the acquisition of Matter does not imply that every provision providing coverage for claims provides coverage for claims arising from acts committed in the acquisition of Matter.[1]

The majority applies the same erroneous reasoning in relying on the definition of the term "Business of the Insured" in section IV. That term, like

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[1] As a demonstration of the majority's logic, imagine a contract in which Insurance Co. insures Mr. X's cars against theft. The contract contains a paragraph of definitions, which defines "car" as "any two-door or four-door car owned by Mr. X." The contract also contains two provisions setting forth terms of coverage. Paragraph I states that "Two-door cars are insured against any theft that occurs during daylight hours." Paragraph II states that "Four-door cars are insured against any theft that occurs at any hour of the day." One of Mr. X's two-door cars is stolen at night. Most readers of the contract would say that Mr. X is out of luck. Under the majority's theory, however, the theft is covered—under paragraph II—because, even though paragraph II seems to cover only four-door cars, the contractual definition of "car" conflicts with that interpretation: A "Car" can be a two-door or a four-door cars. Ambiguities are settled in favor of broader coverage, so the Mr. X wins.

"Claim," includes some matters for which there is coverage only under paragraph I.A, and others for which coverage exists only under paragraph I.B. In such circumstance, I fail to see why the definition leads the majority to believe that paragraph I.A must be extended to cover all occurrences within the entire policy. If paragraph I.A provided coverage for every "Claim" arising in the "Business of the Insured," the paragraph would simply state that the Company agrees to defend against liability "for any Claim arising in the Business of the Insured." Instead, however, the paragraph includes almost a full page of qualifying language, specifying particular claims that are covered under I.A and expressly limiting coverage under that paragraph to claims "*arising in the utterance or dissemination of Matter by the Insured* in the Business of the Insured." (Emphasis added.) The language in the definitions section simply cannot be read to extend coverage under paragraph I.A to all matters pertaining to the Business of the Insured.

In short, Time Warner's argument that I.A. provides coverage for claims arising from the acquisition of Matter, as well as from the dissemination of Matter to a mass audience, is without basis in the policy.